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Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellants,

AGAINST

GAMBLE LATROBE, JR., JAMES B. KNOWLES and WILLIAM S. EICHS, trustees in bankruptcy of THERMIODYNE RADIO CORPORATION,
Appellees.

October Term,
A. D. 1928.
No. 601.

APPELLEES' BRIEF.

Statement.

The following facts, not stated in the appellants' brief, are deemed material:

The bankrupt was engaged in the manufacture and sale of radio receiving sets. It owned and operated a factory in the State of New York, from which it shipped its products to customers without the State. It also had offices at Chicago and San Francisco (R. p. 13). All of its assets, however, were reported to the State Tax Department as being segregated to New York State only (R. pp. 19-20). The percentage of sales made to customers without the State of goods

manufactured within the State does not appear in the record, since interstate business of that character was not a factor in the determination of assets to be "segregated" to New York for the purposes of either the "license fee" or the annual "franchise tax" and was, therefore, not called for in the form of annual report required of the bankrupt (R. p. 13). That report on its face showed that the information therein was to be used in determining the "license fee" under § 181 of the *Tax Law* (R. pp. 18, 20).

While the number of issued shares was 250,000, the amount paid in on them was only $580,000 (R. p. 14) or an average of $2.32 per share; and the average value of the tangible assets, including receivables and cash, was only $280,000 (R. p. 18) or about $1.12 per share. The intangible assets, patents and good will, were of no value, as appears from the fact that the corporation at all times operated at a loss (R. p. 12). Some of the shares were issued at $7.25 per share (R. p. 13) and traded in at 6½ to 22½ (R. p. 20), but presumably these were manipulated prices, as the public issue was floated by a brokerage house and the remaining shares, being almost 80% of the total, were withheld from the market (R. p. 13).

The bankrupt, at about the time of beginning business in the State of New York, received a certificate of authority from the Secretary of State pursuant to *Stock Corporation Law*, §§ 110-111 (R. p. 28).* Those sections, the complete text of § 181 of the *Tax Law*, of which only an extract is printed in the appellants' brief, and parts of §§ 197, 209, 211 and 214 of the *Tax Law*, all as in force in November, 1924, will be found in the Appendix.

* The record, as well as the opinion of the District Court, inadvertently refers to the certificate as issuing under *General Corporation Law*, §§ 15-16. The provisions intended to be referred to, however, were at the time in question §§ 110-111 of the *Stock Corporation Law*. Prior to that time they had been part of the *General Corporation Law*, and since then they have again been enacted as part of that statute. The error is of no importance.

Summary of the Argument.

I. The tax was discriminatory as against the bankrupt and in favor of other foreign corporations enjoying equal privileges in the State.

II. The attempted classification of foreign corporations according to the number of issued shares of non-par stock was not justified by reasons either of convenience or of usage.

III. In the case of foreign corporations having non-par stock there was no relation between the amount of the tax and the value of the privilege conferred by the State.

IV. The real basis of decision in *Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71, is controlling here.

V. The principle of *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, is not applicable to a tax based on the issued stock of foreign corporations, and should not have been followed in the *Maxpay Oil* and *Gilliland Oil Cases*.

VI. The tax, even if it is the price of admission to the State, may be impugned under the Equality Clause of the Fourteenth Amendment.

VII. The attitude of this Court toward the arbitrary taxation of foreign corporations having non-par stock is of national importance.

VIII. The judgment appealed from should be modified so as to direct the reduction of the State's claim to $725 and interest.

POINT I.

The tax was discriminatory as against the bankrupt and in favor of other foreign corporations enjoying equal privileges in the State.

The following examples suffice to illustrate the discriminatory nature of the tax as applied to the bankrupt:

(1) Corporation A, organized under the laws of Delaware, receives authority to do business in the State of New York. It issues 250,000 shares of stock of the par value of $2.50 each, in payment for which it acquires real and personal property, all segregated to the State of New York, of the actual value of $580,000. It engages in business similar to that of the bankrupt. At the end of the first year of its doing business in the State, there is due from it under the provisions of *Tax Law*, § 181 a "license fee" equal to one-eighth of one per cent. of its "capital stock" (held in *People* v. *Sohmer*, 148 App. Div. 514, aff'd 206 N. Y. 634, to mean the par value of the stock and not the actual value of the assets of the foreign corporation), that is to say, $781.25.

(2) Corporation B, a Delaware corporation, doing business in New York similar to that of the bankrupt, has issued 250,000 shares of non-par stock at $100 per share, and has invested the proceeds, $25,000,000, in assets "segregated" to New York. Its "license fee" is $15,000.

(3) Corporation C, a Delaware corporation, doing business in New York similar to that of the bankrupt, has issued 250,000 shares of non-par stock at $23.20 per

share, and has invested the proceeds in assets one-tenth of which, or $580,000, are "segregated" to the State of New York. Its "license fee" is $1,500.

In the first case, a foreign corporation employing in the State of New York the same amount of assets as the bankrupt, pays a fee only about one-twentieth in amount to that demanded of the bankrupt. In the second case, a corporation employing in the State assets about forty-three times greater in value than the bankrupt's, pays only the same fee. In the third case, a corporation employing in the State assets of an equal value to those of the bankrupt, pays a fee one-tenth in amount.

The law imposing a tax on foreign corporations for the privilege of doing business in the State, to be computed upon the basis of the "capital stock" employed within the State, payable after the close of the first year (*Tax Law*, §§ 181, 197) effects a classification of corporations doing business in New York into domestic and foreign corporations, which in view of the different nature of the respective privileges granted to the two classes by the State of New York is a proper one. But the legislature has further classified foreign corporations into those having stock with par value and those having non-par stock, and has still further classified corporations having non-par stock according to the number of shares into which that stock happens to be divided.

The characteristic feature of non-par stock is that neither by the number of its shares nor in any other manner does it indicate the amount paid in or the value of the assets represented. Under the Delaware statute full paid shares of non-par stock may be issued from time to time for such consideration as may be fixed from time to time by the board of directors (*Revised Code of Delaware*, c. 65, sec. 14, as amended).

On the other hand, par value is a representation, not necessarily accurate but at least approximate, as to the amount originally paid in or remaining payable upon the stock,

particularly in States such as Delaware where the payment of par value in money or money's worth is required, under penalty of stockholders' liability for the corporate debts.

Constitution of Delaware 1897, Art. IX, Sec. 3;
Revised Code of Delaware, c. 65, secs. 14, 20;
DuPont v. *Ball*, 11 Del. Ch. 430.

It may, therefore, reasonably be assumed that a Delaware corporation having par value stock employs resources approximately equal to the par amount of the issued stock, and on that amount it is required to pay to the State of New York ⅛ of 1% for the privilege of employing such resources in New York. But a Delaware corporation having non-par stock for a similar privilege is required to pay an amount computed without reference to the amount or value of its assets or of the property paid in on its stock, but determined merely by the number of shares into which the non-par stock happens to be divided. Such classification is one according not to quality, but to accident.

> "• • • a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation and value."
>
> *P. ex rel. Farrington* v. *Meusching*, 187 N. Y. 8.

In that case the Court of Appeals held that a stock transfer stamp tax of 2 cents per share irrespective of par value was unlawfully discriminatory. The statute when amended so as to fix the tax at 2 cents per $100 of par value was sustained by this Court over the objection that the tax was not based on actual values in *Hatch* v. *Reardon*, 204 U. S. 152, where Mr. Justice Holmes (p. 159) pointed out that equality in some cases had "to yield to practical considerations and usage".

The two cases cited exemplify with particular aptness the flexibility, and yet the strength, of the principle requiring equality in taxation. Where the inequality complained of was between shares of similar par but varying actual values, the "practical considerations" controlled: the requirement of a quick method of computation in the case of stock transfer tax stamps rendered the criterion of actual values impractical. But where the inequality complained of was between shares of different par values apparent on the face of the certificates, no necessity of convenience justified the discrimination. So, when non-par stock came into use practical considerations justified a stock transfer tax of 2 cents per share irrespective of actual values. But it is interesting to note that when Congress levied a stamp tax on original issues of capital stock, the actual values represented by non-par stock were taken, within reasonable limits, as the basis for the computation of the tax. In construing the Act of Congress to impose a tax measured by the actual value represented rather than the number of shares, Judge Soper said:

> "* * * When the nature of the two kinds of stock [par value and non-par] is considered, no obvious reason suggests itself for the employment of different methods in the calculation of the tax * * *. It was therefore reasonable that in fixing the taxation for the two classes of stock Congress should make the alleged value the basis of taxation in one case and the actual value the basis of taxation in the other."
>
> *Commercial Credit Co. v. Tait*, 2 F. (2d) 862; aff'd 7 F. (2d) 1022.

POINT II.

The attempted classification of foreign corporations according to the number of issued shares of non-par stock was not justified by reasons either of convenience or of usage.

Whatever may be the situation in other States, in New York it happens that there can be no argument from convenience for computing the "license fee" according to the number of shares of non-par stock rather than according to the actual or market value. One method is as convenient as the other. The explanation is that for the purposes of the annual "franchise tax" provided for in Article 9-A of the *Tax Law*, the computation of the minimum tax of one mill per dollar is based in the case of corporations with non-par stock on the "issued capital stock, at not less than its actual or market value, and not less than five dollars per share, as may be determined by the Tax Commission" (*Tax Law*, § 214). The information necessary for such computation is required to be disclosed in the annual report (*Tax Law*, § 211). Obviously, therefore, since every foreign corporation having non-par stock will have reported the actual and market value of that stock prior to the expiration of its first year of doing business in New York, the computation of the "license fee" can be made on the basis of such actual or market value as conveniently as upon the basis of the number of shares.

Nor does usage, any more than convenience, justify the substitution of "count for weight" in the computation of a tax of this character, that is to say, a tax or fee imposed by a state on a foreign corporation for the privilege of doing business and payable only once. As a matter of fact, there are four different methods of assessing such a charge, to wit:

In Alabama, Colorado, Georgia, Illinois, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Oklahoma, Pennsylvania, South Dakota, Texas, Wash-

ington, West Virginia (minimum valuation per share $25), Wisconsin (minimum valuation per share $10) and Wyoming, the tax is computed on the basis of the actual value of the non-par shares or the assets represented thereby or paid in thereon;

In Arizona, California, Connecticut, Delaware (or fixed by reciprocity), Kentucky, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New Jersey (or fixed by reciprocity), New Mexico, North Dakota, Oregon, Rhode Island and Vermont, there is a fee of a fixed amount not exceeding $250 (although in New Mexico foreign corporations having par value stock pay graduated fees up to $3,000!);

In the following jurisdictions the tax is based on the authorized capital stock, an arbitrary valuation being assigned to shares without par value, viz.:

Idaho, Missouri, North Carolina (maximum tax $250), South Carolina, Tennessee, Utah and Virginia (maximum tax $5,000) $100 per share;

Montana, $50;

Arkansas, $25 (issued stock);

Alaska, $1;

In Florida, Indiana, Nevada, New York and Ohio the tax is computed at so much per share on the number of shares.

Parker: Corporation Manual (30th ed.).

Of forty-nine jurisdictions, then, only fifteen use a method which fixes the tax according to the number of non-par shares without regard to their value, and of those fifteen all except Arkansas and New York base the tax on authorized and not on issued stock, a fact which furnishes an argument of convenience in support of the method (see discussion, *infra*, pp. 18-19).

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In Arizona, California, Connecticut, Delaware (when not exempt by reciprocity), Kentucky, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New Jersey (when not exempt by reciprocity), New Mexico, North Dakota, Oregon, Rhode Island and Vermont, there is a fee of a fixed amount not exceeding $250 (although in New Mexico foreign corporations having par value stock pay graduated fees up to $3,000!);

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This leaves New York standing alone with Nevada—and no complaint is likely to be made of the Nevada statute for the rate is only one-tenth of a mill per share!

POINT III.

In the case of foreign corporations having non-par stock there was no relation between the amount of the tax and the value of the privilege conferred by the State.

To support the classifications here attempted some basis must be found "reasonable or unreasonable, other than mere accident, whim or caprice. There must be some support of taste, policy, difference of situation or the like, some reason for it even if it is a poor one."

P. ex rel. Farrington v. *Mensching*, 187 N. Y. 8, at p. 18.

The appellants suggest as a reason the protection of domestic corporations. So far as discrimination in favor of domestic corporations is concerned, that is a valid reason (*Hanover Insurance Company* v. *Harding*, 272 U. S. 494). But the appellants do not show the necessity of levying a tax which is discriminatory as among various classes of foreign corporations in order to protect domestic corporations.

True, the State of New York charges its own corporations five cents per share for the privilege of authorizing non-par stock (*Tax Law*, § 180), but domestic corporations must pay that organization tax irrespective of the proportion of their assets that they actually employ in the State of New York and irrespective of the number of shares of authorized non-par stock that they actually issue. They pay for the privilege of having authorized stock and not for the privilege of employing assets in the State.

Were the "license fee" payable by foreign corporations of the same character as the "organization tax" payable by domestic corporations, the protection of domestic corporations would be a sufficient justification for the discrimination here complained of. But the two taxes are by their nature

dissimilar: The domestic corporation which files a certificate authorizing a number of shares of non-par stock, issuable at varying prices, is receiving a privilege which the State of its incorporation alone can grant. There are valid reasons for making the price of that privilege higher than the amount exacted for the privilege of authorizing par value stock. But the foreign corporation with non-par stock receives from the State of New York no different privileges from those granted to foreign corporations having par value stock. The protection of property and persons, the administration of justice, the regulation of public utilities and all of the other benefits accorded to inhabitants of the State of New York accrue in equal measure to both classes of foreign corporations. The discrimination effected by the organization tax on domestic corporations as between par value stock and non-par stock, and as between shares of non-par stock issued for varying considerations, is reasonable because of the peculiar character of the privilege granted; the like discrimination in the case of foreign corporations is not reasonable, because the only difference in the privileges granted to them by the State of New York is one measured by the respective amounts of assets employed by them in the State.

POINT IV.

The real basis of decision in *Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71, is controlling here.

The appellants attempt to distinguish the *Air-Way Case* on the ground that there

(1) interstate commerce was involved;

(2) the authorized amount of stock was the basis;

(3) the tax was a "franchise tax".

(1) It is submitted that, despite the language of the opinion, the Commerce Clause was no more involved in the *Air-Way Case* than in the present case.

To support this statement it is necessary to refer to the facts in the *Air-Way Case* and also in the case of *Hump Hairpin Co. v. Emmerson*, 258 U. S. 290. In each of those cases, as in the present case, a foreign corporation was engaged in manufacture of products which were sold by it throughout the United States pursuant to orders accepted only at the place of manufacture and completed by shipments direct from factory to dealers. All of the property, real and personal, of each of the three corporations was situated within the respective taxing state.*

In the *Hump Hairpin Case* the State of Illinois exacted a tax measured by the entire capital stock of the foreign corporation, although about 90% in gross amount of the sales had been made to customers outside of Illinois. This Court was of the opinion that while such sales constituted interstate commerce, the effect of the tax thereon was incidental, remote and unimportant.

In the *Air-Way Case* about 70% in gross amount of the sales were made to customers outside of Ohio, but this fact did not appear in the report first filed by the company and the taxing authorities computed the tax on the basis of the entire capital stock. The company then attempted to file an amended report showing the percentage of sales made to customers without the State. The State taxing authorities refused to accept the amended report but the statutory court which heard the injunction suit (*Air-Way Electric Appliance Corporation v. Archer*, 3 F. (2d) 669) decided that the com-

* In the *Air-Way Case* there are a few intimations in the record that goods manufactured in Ohio were located in warehouses without the State, but the affidavit of the treasurer of the company (transcript of record, p. 27) shows that all goods so stored had already been actually sold in sales accepted in Ohio and were merely awaiting the completion of the sale by payment.

pany was entitled to the benefit of an apportionment according to the formula:

$$\frac{\text{Ohio property} + \text{Ohio sales}}{\text{Total property} + \text{total sales}} \times \text{Authorized shares}$$

The court disapproved the ruling of the Attorney-General of Ohio that the business of operating a factory in Ohio may be measured by the volume of sales whether made in interstate commerce or not. Although recognizing that in all essential facts the case before him was the same as the *Hump Hairpin Case*, Judge Sater said (p. 671):

> "• • • In the instant case the amount assessed by the Commission upon interstate commerce is not remote, incidental and unimportant but on the contrary is a substantial sum levied directly upon the stock representing interstate business."

It is impossible to follow this reasoning unless Judge Sater had in mind the specific figures of the taxes assessed on the basis of the entire stock: in the *Hump Hairpin Case*, $6,045, and in the *Air-Way Case* $20,000. Yet, omitting intangibles, the assets of the two companies were closely similar: in the Illinois case, $416,629; in the Ohio case, $458,278. The gross sales were likewise close: in the Illinois case, $263,334; in the Ohio case, $250,594. The percentage of interstate business in the Illinois case, 90%, was substantially larger than in the Ohio case, 71%. In neither case does it appear what proportion of the gross interstate sales was allocable to manufacturing or other operations not essentially interstate commerce. Presumably Judge Sater considered a tax of $6,045 an unimportant burden on such portion of $237,520 as really represented interstate commerce, but $20,000 a substantial burden on the corresponding portion of $179,792.

This decision of the statutory court furnished the basis for a cross-appeal to this Court by the Ohio authorities, but the point raised in the cross-appeal was not passed on. Had the statute been sustained, this Court would have had to

allow the cross-appeal or overrule the *Hump Hairpin Case*. It is believed, however, that the Court is not disposed to depart from the principle of the *Hump Hairpin Case* as to corporate taxes measured by capital stock or the analogous principle as to corporate taxes measured by net income (*Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113; *Bass etc.* v. *Tax Commission*, 266 *id.* 271). In fact, those principles are followed generally in the taxing statutes and administrative practice of the States today. For example, in the annual report required from all corporations, domestic and foreign, doing business in New York, the amount of bills and accounts receivable arising from the sale of goods manufactured in New York whether or not made in interstate commerce are segregated to New York (R. p. 19).

Some language in the *Hump Hairpin Case* might be taken to mean that the gross amount of the sales made in interstate commerce in that case ($263,334) was so small compared with the total amount of property reported to be in Illinois ($5,540,755) that this Court believed the burden on interstate commerce to be unimportant. The tangible property, however, was only $416,629, the balance of the larger amount apparently being arbitrarily assigned as the "potential value" of patent rights, licenses, trade-marks, secret processes and good will. The ratio between the gross amount of sales in interstate commerce and the reported amount of property, was, however, of no relevance, for it was not the purpose of the Illinois legislature, any more than that of the General Assembly of Ohio, in the words of Judge Sater (3 F. (2d) at p. 671):

> "to include interstate business as a basis for the levy, but only as a factor in determining the proportion that should be paid upon strictly state business."

It is true that the formulæ used in Illinois and Ohio were somewhat different, the Illinois statute requiring the formula

$$\frac{\text{Illinois business}}{\text{Total business}} + \frac{\text{Illinois property}}{\text{Total property}} + 2 \times \text{Total par value of stock}$$

But in principle the situation in the two cases was identical.

If the failure of the Illinois authorities to apply the above formula was not sufficient in the opinion of this Court to burden interstate commerce, it was not because of any relation between the figures as to interstate sales and intrastate property but because *of the series of transactions beginning with the manufacture within the State and ending with the delivery to a customer without the State so large a proportion was intrastate business that the interstate element was reduced to the lowest terms, i. e., the gross amount of sales in interstate commerce did not really represent only interstate transactions.* If that is the correct explanation of the *Hump Hairpin Case* then there should have been no apportionment in the *Air-Way Case* and the Commerce Clause was not a true ground of decision. This is clear from the language of the opinion (266 U. S. at p. 82):

> "All plaintiff's business, intrastate and interstate, and all its property wherever located were represented by the 50,485 shares of stock outstanding. * * * The inevitable effect of the act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio, and engaged in interstate commerce, wherever the number of shares authorized, subject to the charge of five cents each, exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that State. In this case, the fee fixed by the commission was based on nearly eight times the number of outstanding shares and that determined by the court on nearly six times that number. As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business including the interstate commerce of the plaintiff."

It is difficult to see how the interstate business as distinguished from the property used therein or the good will attached thereto was represented by any of the outstanding shares. There could hardly have been any good will attached to the interstate business of Air-Way Electric Appliance

Corporation, for its operations showed a loss (transcript of record, p. 23). If in the *Hump Hairpin Case* the sales in interstate commerce amounting to 90% of the total were not represented by the outstanding shares, although 92% of the total property of the company consisted of intangibles including good will, then the outstanding shares of Air-Way Electric Appliance Corporation did not represent the sales made by it in interstate commerce; and if a tax based on the entire capital stock of Hump Hairpin Company without apportionment was not a direct burden on interstate commerce, then a tax based on the entire amount or a part of the capital stock of Air-Way Electric Appliance Corporation, whether authorized or issued and whether at an arbitrary rate or actual value, was not a direct burden on its interstate business.

That at least the Commerce Clause is not an important ground of decision in the *Air-Way Case* is suggested by the opinion of this Court in *Hanover Insurance Co.* v. *Harding*, *supra*, where the *Air-Way Case* is classified with the cases based on the Equality Clause and not with the cases based on the Commerce Clause (272 U. S., at p. 508).

(2) The use of authorized rather than issued stock as a basis for the computation of the tax was undoubtedly an important factor in the decision in the *Air-Way Case*, but in principle the use of the issued number of shares of non-par stock is open to the same objections as the use of the authorized number of shares of any kind. Had the Ohio statute based the tax on issued and not authorized shares, the opinion of the Court would have been applicable with no change in substance and little change in wording. This is shown by the following altered excerpt, from which the references by the Court to the number of authorized shares have been omitted and words referring to issued shares have been substituted, the substituted words being italicized and enclosed in brackets:

> "• • • The number of non-par value shares of the corporation is not an indication of, and does not purport to be a representation as to, the amount of its capital.

Each outstanding share represents merely an aliquot part of its assets. * * * Plainly the fee, to the extent that it is based on [*the number of issued non-par shares*] has no relation to what was paid in for the stock or to its value or to the amount of plaintiff's capital, its property or its business, intrastate in Ohio or interstate. The act in its practical operation does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances. Unless, under the laws of the States where organized they chance * * * to issue the same number of non-par value shares, the annual franchise fees imposed on foreign corporations having the same amount of property and business, and exercising the same privileges in Ohio will not be the same; and the charge imposed on one may be many times that made against another. * * * compare two corporations organized in a sister State having the same number of [*issued*] non-par value shares, one having property and business of little value, all in Ohio, and the other having much more property and business in that State, and also much property and business in other States. The act would require the former to pay five cents per share on all its shares, but would require the latter to pay a fee based only on the proportion of its shares representing its property owned and used and business transacted in Ohio.

"It is clear that the mere number of [*issued*] non-par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made. * * * The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. * * * The act violates the equal protection clause of the Fourteenth Amendment."

(3) It is also true that the tax involved in the *Air-Way Case* was a tax payable annually similar to the New York "franchise tax" and not a tax payable only once such as the New York "license fee". Whether this is a substantial ground of distinction is discussed below under Point VI (*infra*, p. 21).

POINT V.

The principle of *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, is not applicable to a tax based on the issued stock of foreign corporations and should not have been followed in the *Margay Oil* and *Gilliland Oil Cases*.

This Court is now committed to the doctrine that a tax on domestic corporations may be based on the number of authorized shares of non-par stock, irrespective of the amount paid thereon or the value of the assets represented thereby.

Roberts & Schaefer Co. v. *Emmerson, supra;*
Montgomery Ward & Co. v. *Emmerson*, 277 *id* 573.

Such discrimination is justified on two grounds; first, the peculiar nature of the privilege granted by the State; and, second, the practical inconvenience of assigning in advance a value per share to authorized shares which may be issued in the future at varying rates of consideration.

That the first ground does not apply to the case of a foreign corporation is apparent from the language of the Court in the *Roberts & Schaefer Case* referring to the *Air-Way Case:*

> "• • • The authority to issue its capital stock was a privilege conferred by another State and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that State. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock. This was held, in the *Air-Way Case* to be an unconstitutional discrimination, since it resulted in a tax larger than the tax imposed on other corporations with like privileges and like business and property within the State, but with a smaller capital authorized under the laws of the State of their creation."
>
> 271 U. S. 50, at p. 54.

The language quoted is equally applicable to distinguish a tax based on the issued number of shares of non-par stock of a foreign corporation from a tax on domestic corporations such as was before the Court in the *Roberts & Schaefer Case.*

The other ground of decision in the *Roberts & Schaefer Case,* namely, the difficulty of appraising unissued non-par stock is not applicable where the tax is measured by issued and not by authorized shares.

When, therefore, the Arkansas statute imposing a tax on foreign corporations based on the number of their issued shares of non-par stock taken at an arbitrary valuation of $25 per share came before this Court (*Margay Oil Corp.* v. *Applegate,* 273 U. S. 666; *Gilliland Oil Co.* v. *Arkansas,* 274 *id.* 717), the principles announced in the *Air-Way Case* should have been followed. If the ground of distinction announced in the *Roberts & Schaefer Case* as distinguishing that case from the *Air-Way Case* was valid then the two Arkansas cases should have been distinguished from the *Roberts & Schaefer Case* on the same ground. On the other hand, it is impossible to distinguish in principle the Arkansas cases from the *Air-Way Case.* The use of the issued number of shares of non-par stock as the basis of computation of a tax on foreign corporations is as discriminatory in effect as the use of the authorized number of shares of any kind, and the taxing State is no more concerned with the privilege of a foreign corporation to issue shares of non-par stock than with its privilege to authorize shares of any kind.

It is submitted, therefore, that the Court should reconsider the position taken in the Arkansas cases.

It is believed that the correct rule has been expressed by the Supreme Court of Illinois as follows:

> "Any system of taxation must have for its basis some standard of value. It may be the amount of business transacted, the amount invested in business, net profits or other standard capable of measurement in money. It is the province of the Legislature to determine the standard. If it is the amount of capital stock, the amount must be reducible in some way to terms of money, and

it must be fixed with some regard to value, whether par value, issue price, market value, or value determined in some other manner and not by an arbitrary valuation at a set figure, whether $100.00, $5.00, or $500.00. There is no universal or generally prevalent law or custom which establishes the value of shares of stock of no-par value at any certain figure, and a law of one state which enacts that for purpose of taxation the shares of stock of foreign corporations having no par value shall be regarded as of a definite, specific value, is arbitrary, discriminatory and denies due process of law and the equal protection of the law. The terms of the General Corporation Act which provide that in the event that the corporation has stock of no-par value, its shares for the purpose of fixing fees shall be considered to be of the par value of $100.00 per share are therefore discriminatory between foreign corporations having shares of stock of no-par value issued at different prices and in different amounts.

* * * * * *

"The number of shares into which the capital stock of foreign corporations may be divided is not a reasonable basis for classification of such corporations for the purpose of determining the amount either of the initial fee for a certificate of authority to do business in Illinois, or of the annual franchise tax, and, therefore, an arbitrary valuation of the capital stock of no-par value of such corporations at $100.00 a share, or any other denite amount a share, without reference to par value, sale price, market price, or any consideration other than number of shares, renders such classification discriminatory against corporations which have issued such stock at prices less than $100.00 a share and denies to them due process of law and the equal protection of the laws."

O'Gara Coal Co. v. *Emmerson*, 326 Ill. 18, 36, 47.

The decisions of State courts cited in the appellants' brief are not persuasive towards a different view. The decisions of the Supreme Courts of Arkansas and Missouri (*State* v. *Margay Oil Co.*, 167 Ark. 614; *State* v. *Pierce Petroleum Corp.*, 2 S. W. (2d) 790) appear to be based mainly on the fact that a similar method was provided for computing the

tax on domestic corporations. In *American Uniform Co.* v. *Commonwealth*, 257 Mass. 242, the tax was based on authorized not issued stock, so that the argument from convenience already referred to was present. In *Detroit Mortgage Corp.* v. *Secretary*, 211 Mich. 320, the fact that the State of incorporation of the foreign corporation provided for an arbitrary valuation of non-par stock appeared to influence the decision.

POINT VI.

The tax, even if it is the price of admission to the State, may be impugned under the Equality Clause of the Fourteenth Amendment.

The point chiefly relied on by the appellants, and the one which furnishes the main text of the discussion in Judge Morris' opinion below, is that payment of the "license fee" being a condition upon which the corporation was admitted to the State, the measure of its amount was within the discretion of the legislature.

While the appellants' brief contains some allusions to the "contract obligation" of the bankrupt, there can be no pretense that the bankrupt in fact agreed to pay the tax or assented to the method by which it was computed. Any consent relied on must be one raised by implication of law from the acts of the corporation in entering the State and applying for authority to do business, but it is now too late to contend that such an implied consent to any particular condition is not limited co-terminously with the power of the State to impose such condition *in invitum* (*Hanover Insurance Co.* v. *Harding*, 272 U. S. 494, 517).

The first premise of the appellants' argument is that the power of a State to affix conditions to the entrance of foreign corporations is unqualified. It is true that, aside from cases where the Commerce Clause or the jurisdiction of the federal

courts was concerned, very few of the decisions of this Court have sustained the right of a foreign corporation to question a statute which was on the books when the corporation entered the State. It is also true that the extension of the "doctrine of unconstitutional conditions" to include the Equality Clause involves a logical dilemma, for a foreign corporation, bartering at the State's border, is not a "person within its jurisdiction" and, therefore, is not yet vested with the right to equal protection of its laws. Nevertheless, the Equality Clause has been held to be included in the doctrine mentioned.

Power Mfg. Co. v. *Saunders*, 274 U. S. 490;
Quaker City Cab Co. v. *Pennsylvania*, 277 *id.* 389.

These cases reflect a realistic attitude which solves the dilemma: the entrance into the State, with or without authority, constitutes the foreign corporation a "person within its jurisdiction", and it is the *prospective* constitutional right waiver of which is nullified by the doctrine referred to. So, if the corporation enters without authority and even without the purpose of engaging in the transaction of its ordinary business, but solely to enforce its rights in the State's tribunals, it becomes a "person" entitled to the protection of the Equality Clause.

Kentucky Finance Corporation v. *Paramount Auto Exchange Corporation*, 262 U. S. 544.

The contention may be made, however, that in each of the three cases last cited compliance with the statute in question was not a condition of admission into the State, and that, therefore, the cases are not authorities against the existence of unqualified power to impose such conditions. The appellants appear to find such a distinction suggested in *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494. But the facts of that case do not support the construction contended for. The question for decision was whether the assessment at full value and taxation of the net receipts of

foreign insurance companies was an unlawful discrimination in favor of domestic companies which paid no tax on net receipts and paid taxes on personal property assessed at only 30% of full value. There was no question but that payment of the tax was a condition of renewal of the annual license to do business in the State. The Chief Justice, however, in delivering the opinion of the Court, declared it necessary first to determine whether the tax was in its nature a payment for the privilege of being admitted, in which case there could be no discrimination as between foreign and domestic companies, because of the difference in the privileges granted, or a contribution to the general tax burden borne by all of the inhabitants of the State, in which case such inequality would not be justified. The Court did not decide, nor does the opinion imply, that inequality *as between foreign companies* in the imposition of a tax for the privilege of admission was within the discretion of the State. In fact, in discussing the limitations on the power of the State in fixing the conditions of admission the Chief Justice cited the *Air-Way Case* in which the inequality was between foreign corporations.

There appears to be no more reason for holding a State empowered to affix conditions of admission which are unreasonably discriminatory as between the applicants for admission than to affix conditions, whether of initial admission or of permission to remain, which, if complied with, will deprive the corporation of its property without due process of law, or burden its interstate commerce, or deprive it of recourse to the federal courts. Compliance with any of the conditions last mentioned might be asked as the *price* of admitting the foreign corporation to equality with domestic corporations under the doctrine of the *Hanover Insurance Case*, and yet, as suggested in that case, the foreign corporation might enter or continue to remain and refuse to pay the price. If, then, standing at the border a foreign corporation can say to the State: "We will enter, but after we *shall have* acquired property within and without

your jurisdiction we will disregard your statute taxing us on the basis of our entire capital stock without apportionment," or "we will enter, but after we *shall have* engaged in interstate commerce we will disregard your statute burdening such commerce," or "we will enter, but after we *shall be* an inhabitant of your State we will disregard your prohibition of our recourse to the federal courts,"—then with equal assurance it should be able to say: "We will enter, but after we *shall become* a person within your jurisdiction we will disregard your statute unreasonably discriminating against us in favor of other foreign corporations." In all of the cases supposed, the constitutional right, waiver of which the State is not empowered to exact as the price of admission, does not vest in the corporation until it has entered the State. Obviously, therefore, it is not necessary to establish that the right existed before the corporation crossed the border. That would be necessary only if the State exacted present compliance, *e. g.*, a payment of money, at the border —a case which is hardly likely to occur. Whether a State has unqualified power to exact compliance even with that kind of condition, it is not necessary to consider, for certainly no such present compliance *at the border* was exacted here. Only after the first year was the "license fee" payable.

The appellants maintain, however, as the second premise of their argument, that notwithstanding postponement of the due date payment of the "license fee" was a condition of the character which is beyond constitutional restraint. The word "condition" is used in this connection in various senses. That payment of the "license fee" was a condition precedent to, *i. e.*, the price of, admission of the foreign corporation to *equality with domestic corporations*—the sense in which the term was used in the *Hanover Insurance Case*—must be conceded, despite the intimation to the contrary in Judge Morris' opinion below. That such payment was not a condition precedent to the grant of authority to do business is clear from a reading of *Stock Corporation Law*, §§ 110-111 and the decisions of the New York Court of Appeals

(*Parmele Co.* v. *Haas*, 171 N. Y. 579; *Wood & Selick* v. *Ball*, 190 *id.* 217). That it was not, in strict sense, a condition precedent to entry is admitted in Judge Lehman's opinion (*P. ex rel. D. W. Griffith, Inc.* v. *Loughman*, 249 N. Y. 369).

It is submitted that whether or not payment of the "license fee" was a condition, precedent or subsequent, in any of the senses referred to by the Chief Justice or Judge Morris or Judge Lehman is not material here. Every tax on a foreign corporation, whether payable only once, or once every ten years, or every year, if non-payment would lead to ouster, is a condition of admission or of permission to remain. If compliance with that condition is also the price of admission to equality with domestic corporations, then discrimination in favor of such corporations cannot be complained of. But whether the tax is such an admission fee, or a contribution to the general tax burden, in either case it must not involve burdening interstate commerce, depriving the foreign corporation of property without due process, or denying equality with other persons similarly situated and receiving like privileges.

That this Court finds no distinction between "license fee" and "franchise tax," in the sense contended for by the appellants, at least where the Commerce Clause and the Due Process Clause are concerned, is shown by the decision at this term in *Cudahy Packing Co.* v. *Hinkle* (No. 278, decided February 18, 1929, Adv. Op. 49 Sup. Ct. Rep. 204). There a "filing fee", payable only once, and a "license fee", payable annually, were alike held invalid because based on the total capital stock of the foreign corporation without apportionment. In the opinion of Dietrich, *C. J.*, sitting on the statutory court (24 F. (2d) 124), the "filing fee" was clearly valid on the ground that it was

> "a single charge for the privilege of entering the State and there exercising its corporate functions in the transaction of interstate business, for an indefinite period."

Yet no distinction as between the two kinds of tax was recognized by this Court.

It is, therefore, not possible to accept the dictum of Judge Lehman, (249 N. Y. at p. 374), that

> "the power of the State to impose upon a foreign corporation a license fee or tax as a condition precedent of its entry into the State is, from its nature, less subject to constitutional limitations than the power to impose a franchise tax as payment or compensation for the privilege of continuing to do business here."

On the contrary, except as concerns equality between domestic and foreign corporations, constitutional limitations on the two kinds of tax are the same.

This being granted, the balance of Judge Lehman's opinion in the *Griffith Case* is not persuasive. He fails to explain why the objections raised in the *Air-Way Case* to a tax based on authorized non-par stock at five cents per share are not equally applicable to a tax based on issued non-par stock at six cents per share. He fails to explain why the reasons announced in the *Roberts & Schaefer Case* for sustaining a tax based on the authorized non-par stock of a domestic corporation apply to a tax based on the issued non-par stock of a foreign corporation. It is to be noted that none of his language on the subject of constitutionality was necessary to the decision of the case.

POINT VII.

The attitude of this Court toward the arbitrary taxation of foreign corporations having non-par stock is of national importance.

On January 1, 1928, the aggregate market value of non-par stock listed on the New York Stock Exchange was nearly $17,000,000,000 (See bulletin of National Industrial Conference Board in Appendix.)

Of the entire number of returns filed by corporations having non-par stock for the purposes of the federal capital stock tax in 1925, 20% were made by Delaware corporations. (See bulletin, *supra*.) Of the entire number of corporations formed in Delaware 46% are authorized to issue non-par stock. (Information obtained from State School Tax Department.) It is reasonable to suppose that most of these corporations will do business in other States.

In the course of developing the principles which safeguard foreign corporations from the exactions of the States, this Court has reflected the change in ideas generally which has been brought about by the constantly growing importance of nation-wide business conducted in the corporate form. It well be a step backward if these principles are not applied in aid of, and not to discourage, the use of so widely prevalent and admirable an instrument as non-par stock.

While in the instant case the arbitrary nature of the impost is sufficiently apparent—being about 5⅓% of the total value of the assets in the State—an even more striking instance of the inequality produced by statutes of the character in question is about to be heard by this Court (*International Shoe Co.* v. *Shartel*, Oct. Term, 1928, No. 579). There non-par stock of a foreign corporation having the actual value of $46,000,000 has been arbitrarily valued by the State of Missouri at $376,000,000, making a difference in the annual tax of over $77,000!

Such inequalities will increase in number and extent, unless this Court reconsiders the position taken in the Arkansas cases and once more announces the principles set forth in the *Air-Way Case*.

POINT VIII.

The judgment appealed from should be modified so as to direct the reduction of the State's claim to $725 and interest.

If the provision of § 181 of the *Tax Law* as to non-par stock is held to be invalid, the statute as it was before being amended to include such provision (L. 1921, c. 705, § 3) remains in force. The bankrupt was, then, in the same position as the relator in *P. ex rel. Terminal and Town Taxi Corporation* v. *Walsh*, 202 App. Div. 651, where § 181 before amendment was held to impose on a foreign corporation having non-par stock a "license fee" based on the actual capital *i. e.*, assets employed within the State. In the case of the bankrupt the amount paid in on its stock was $580,000. If this amount is taken to be the capital employed in the State the tax at the rate of ⅛ of 1% is $725. A modification of the judgment appealed from, so as to reduce the claim of the State of New York to $725 with interest and to allow the claim as so reduced, is consented to by appellees.

Respectfully submitted,

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Counsel for Appellees.

Appendix.

TAX LAW

LAWS OF NEW YORK, 1909, c. 62

Entitled "An Act in relation to taxation, constituting chapter sixty of the consolidated laws."

* * * * * * *

§ 181. License tax on foreign corporations. As used in this section, the term "corporation includes a joint stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument. Every foreign corporation, except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations, doing business in this state, shall pay for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; which first payment shall not be less than ten dollars; and if in any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this state on which a license fee has not been paid then a license fee at the rate of one-eighth of one per centum shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bears to the gross assets wherever employed in business. On the issued capital stock of any corporation issuing shares without designated monetary value such corporation shall pay for the use of the state a license fee of six cents on each such share

employed in this state, as hereinbefore provided. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license fees shall be paid shall be fixed by the state tax commission, which shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof as it has in the case of domestic corporations, and the state commission shall have the same power to issue a warrant for the collection of such license fees, as now exists with regard to domestic corporations. No action shall be maintained or recovery had in any of the courts in this state by such foreign corporation after thirteen months from the time of beginning such business within the state, without obtaining a receipt for the payment of the license fee upon the capital stock employed by it within this state during the first year of carrying on its business in this state.

[As amended L. 1910, c. 340 § 1; L. 1915, c. 317 § 3; L. 1917, c. 490 § 1; L. 1921, c. 705 § 3; L. 1922, c. 375; L. 1924, c. 332 § 1]

* * * * * * *

§ 197. Payment of tax and penalties. A tax or fee imposed by section one hundred and eighty-one of this chapter shall be due and payable immediately after the close of the first year of carrying on business in this state. * * *

[As amended L. 1924, c. 332 § 10]

* * * * * * *

§ 209. Franchise tax on corporations based on net income. For the privilege of exercising its franchise in this state in a corporate or organized capacity every domestic corporation, and for the privilege of doing business in this state, every foreign corporation, except corporations specified in the next section, shall annually pay in advance for the year beginning November first next succeeding the first day of July in each and every year an annual franchise tax, to be computed by the tax commission upon the basis of its entire

net income, as defined in subdivision three of section two hundred and eight of the tax law, for its fiscal or the calendar year next preceding, as hereinafter provided, * * *.

[As amended by L. 1924, c. 329 § 2.]

* * * * * * *

§ 211. Reports of corporations to tax commission. Every corporation taxable under this article as well as foreign corporations having officers, agents or representatives within the state shall annually on or before July first, or within thirty days after the making of its report of entire net income to the United States treasury department for any fiscal or calendar year, preceding said first day of July, transmit to the tax commission a report in the form prescribed by the tax commission, specifying:

[As amended by L. 1920, c. 640 § 3.]

1. The name and location of the principal place of business of such corporation, the state under the laws of which organized, and the date thereof; the amount of its issued capital stock and the kind of business transacted. Any corporation not organized under the laws of any state within the United States shall state the facts in relation to its entire net income as though organized under the laws of this state.

[As amended by L. 1919, c. 628 § 4.]

2. The amount of its entire net income for its preceding fiscal or the preceding calendar year as provided by subdivision three of section two hundred and eight of the tax law, except as provided in subdivision one of this section.

[As amended by L. 1924, c. 329 § 3.]

3. The average monthly value for the fiscal or calendar year of its real property and tangible personal property in each city, village or portion of a town outside of a village within the state, and the average monthly value of all its real property and tangible personal property wherever located.

4. The average monthly value for the fiscal or calendar year of bills and accounts receivable arising from (*a*) personal property sold by the corporation from merchandise manufactured by it within this state; (*b*) personal property owned by the corporation and not manufactured by it within this state but sold by it or its agents and located within the state at the time of the receipt of the order; (*c*) the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the state, and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this state; and (*d*) services performed by any officer, agent or representative of the corporation connected with, sent from or reporting, either directly or indirectly, to any officer located in this state or at any office located, owned, rented or occupied in this state. Also the average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from the manufacture by it of personal property or the purchase or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans.

[As amended by L. 1919, c. 628 § 4; L. 1920, c. 640 § 3.]

* * * * * * *

7. Such other facts as the tax commission may require for the purpose of making any computation required by this article, or for the purpose of comparison with former reports to determine whether or not such reports were erroneous or fraudulent.

[As amended by L. 1920, c. 640 § 3.]

8. Any corporation taxable hereunder upon its entire net income may omit from its report the statements required by subdivisions four and five by incorporating in its report a consent to be taxed upon its entire net income. Corpo-

rations having no net income shall, however, complete the segregation of assets in every case.

[As amended by L. 1919, c. 628 § 4.]

* * * * * * *

§214. Computation of tax. If the entire business of the corporation be transacted within the state, the tax imposed by this article, if imposed upon the entire net income, shall be based upon the entire net income of such corporation for such fiscal or calendar year as defined in section two hundred and eight of this chapter, subject, however, to any correction thereof for fraud, evasion or error, as ascertained by the state tax commission. If the entire business of such corporation be not transacted within the state, the tax imposed by this article shall be based upon a proportion of such entire net income, to be determined in accordance with the following rules: The proportion of the entire net income of the corporation upon which the tax under this article shall be based, shall be such portion of the entire net income as the aggregate of

1. The average monthly value of the real property and tangible personal property within the state.

2. The average monthly value of bills and accounts receivable arising from (*a*) personal property sold by the corporation from merchandise manufactured by it within the state; (*b*) personal property owned by the corporation and not manufactured by it within this state but sold by it or its agents and located within the state at the time of the receipt of the order; (*c*) the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the state, and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this state; and (*d*) services performed by any officer, agent or representative of the corporation connected with, sent from, or reporting, either directly or indirectly, to any officer located in this state or at any office located, owned, rented or occupied in this state.

3. The proportion of the average value of the stocks of other corporations owned by the corporation, allocated to the state as provided by this section, bears to the aggregate of

4. The average monthly value of all the real property and tangible personal property of the corporation, wherever located.

5. The average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from (*a*) personal property sold by the corporation from merchandise manufactured by it within and without this state; and (*b*) the purchase, or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans.

6. The average total value of stocks of other corporations owned by the corporation.

* * * * * * *

Real property and tangible personal property shall be taken at its actual value where located. The value of share stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the state in accordance with the value of the physical property in and out of the state representing such share stock.

It is further provided that every domestic corporation exercising its franchise in this state and every foreign corporation doing business in this state, other than those exempted by section two hundred and ten of this chapter, shall be subject to a minimum tax of not less than ten dollars and not less than one mill upon each dollar of such a part of its issued capital stock, at its face value, as the amount of its gross assets employed by it in its business in this state bears to its gross assets wherever employed by it in its business. But if such a corporation has stock without par value, then

the base of the tax, with relation to such stock, shall be such a portion of such issued capital stock, at not less than its actual or market value, and not less than five dollars per share, as may be determined by the tax commission, as its gross assets employed in its business in this state bear to the entire gross assets employed in its business.

If such a corporation is subject to a tax at the rate of one mill, and it maintains no regular place of business outside this state, except a statutory office, it shall be taxed upon its entire issued capital stock as herein provided.

[As amended by L. 1921, c. 705 § 4.]

STOCK CORPORATION LAW

LAWS OF NEW YORK 1923, c. 787

Entitled "An Act relating to stock corporations, constituting chapter fifty-nine of the consolidated laws."

* * * * * * *

§ 110. Certificate of authority; change of name. 1. No foreign stock corporation other than a moneyed corporation shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation created under the laws of this state, for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The secretary of state shall issue such certificate to any such corporation so complying. No such foreign corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate. This prohibition shall also apply to any assignee of such foreign corporation and to any person claiming under such assignee or such foreign corporation or under either of them.

[Formerly Sec. 15 of *General Corporation Laws.*]

§ 111. Proof to be filed; designation of attorney; service of process. 1. Before granting such certificate of authority the secretary of state shall require such foreign corporation to file in his office a sworn copy in the English language of its charter or certificate of incorporation and a statement in its corporate name signed and acknowledged by its president, or a vice-president, or its secretary, treasurer, managing director or attorney in fact, concisely setting forth the business which it proposes to carry on within the state and its proposed principal place of business within the state and the post-office address thereof and designating the secretary of state as its agent upon whom all process in any action or proceeding against such corporation may be served within the state. * * * Such designation shall continue in full force and effect until the filing of a certificate of surrender of authority pursuant to this article.

[Formerly Sec. 16 of *General Corporation Laws.*]

NATIONAL INDUSTRIAL CONFERENCE BOARD, INC.
247 PARK AVENUE, NEW YORK, N. Y.

AUGUST 1, 1928.

Rapid increase in the use of no-par stock in the financing of corporations in the United States is disclosed by an analysis of the extent of such issues, prepared by the National Industrial Conference Board, 247 Park Avenue, New York. While there is no means of ascertaining the total amount of no-par stock outstanding since 1925, the immense growth of this method of financing in recent years is reflected in the fact that, while the "fair value" of all outstanding no-par stock in 1925 is estimated by the Conference Board as less than $7,000,000,000, the market value of no-par issues listed on the New York Exchange alone at the beginning of 1928 amounted to nearly $17,000,000,000.

This latter figure in part reflects a considerable increase in market value as well as in actual number of shares issued, but an analysis of corporation financing during the past six years indicates that no-par value issues are becoming increasingly popular, particularly with big business concerns. Although the first law permitting no-par issues was enacted in 1912, in New York, little if any effort has been made to discover the total amount of no-par stock outstanding. On the basis of capital stock tax data, however, the Conference Board finds that by 1922, a total of 6,763 companies or nearly two per cent of all corporations in the United States, had issued no-par shares, while in 1925 a total of 17,543, or nearly five per cent of all corporations had issued no-par stock, the total "fair value" of which amounted to approximately $6,900,000,000.

Like data are not available for later years because the capital stock tax was discontinued in 1925, but the listings on the New York Stock Exchange, representing the bulk of all important issues, reflect still more rapid growth of no-par stock issues during the past four years. In 1925, 213, or 23 per cent of a total of 926 issues listed on that exchange, were no-par issues, representing in market value $5,284,000,000 or 19.5 per cent or less than one-fifth of the total market value of $27,070,000,000 of all listed issues. By 1928, the number of no-par issues had grown to 399, representing 36.4 per cent of all issues listed, with a market value of $16,850,000,000 which is 33.9 per cent or more than one-third of the total market value of all listed stock issues.

While these figures disclose the increase of no-par stock outstanding in proportion to the outstanding total of securities, they do not fully reflect the important rôle played by this form of stock issues in the new year by year financing during the past few years. During 1926, when the net gain of stock listings over 1925 was 117, as many as 90 issues or more than 75 per cent were no-par issues. In both 1927 and 1928, the net gain in the number of stock issues listed over the preceding year was greater for the no-par issues than for the total of all issues.

No-par stock issues appear to be most popular among industrial, service and finance corporations, but are found hardly at all in the field of railroad financing. Leaving out railroad stock issues from the total number of issues listed on the New York Exchange as of January 1, 1928, the Board finds that nearly 43 per cent of all outstanding non-railroad stock issues were of the no-par variety.

While corporations with no-par stock issues operate in practically all states, the proportion of all returns made to the Internal Revenue Bureau is greatest in Delaware, where such corporations accounted for one-fifth of all returns in 1925. Rhode Island, Massachusetts, Maryland, Ohio, New York and the District of Columbia rise considerably above the average.

In the following table is shown the increasing proportion of no-par stock issues listed on the New York Stock Exchange during the past four years:

Jan 1.	All Issues	No-par Issues	Per cent of all
1925	926	213	23.0
1926	1,043	303	29.1
1927	1,081	355	32.8
1928	1,097	399	36.4